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IN THE

Supreme Court of the United States

October Term, 1950.

No. 453.

RAY H. GARNER, HARRY BECKERMAN, AIDA BELDNER, JOHN B. BROWN, CARRIE L. DICK, MARY E. GRUNEWALD, EUGENE HALLETT, MARGARET B. HASKELL, EDWARD HAVENS, CORNELIUS LAWRENCE, VERA MANN, OLA ROSS PACIFICO, DANA PLATT, EUGENE REED, FRANCES SCHWARTZ, WILLARD SMART, FRANK TORREANO,

Petitioners,

vs.

BOARD OF PUBLIC WORKS OF THE CITY OF LOS ANGELES; CLARENCE J. DERRICK, JOSEPH O. DONOVAN, LOUIS M. DREVES, FRANK GILLELEN, EDWARD L. TAYLOR, and MILTON OFFNER, as Members of the Board of Public Works of the City of Los Angeles; BOARD OF CIVIL SERVICE COMMISSIONERS OF THE CITY OF LOS ANGELES; SAMSON A. LINDAUER, JUSTIN W. GILLETTE, CHARLES E. ARNN, RANSOM M. CALLICOTT, and MRS. IDA S. LAZARD, as Members of the Board of Civil Service Commissioners of the City of Los Angeles; DAN O. HOYE, City Controller of the City of Los Angeles; THE CITY OF LOS ANGELES, a Municipal Corporation,

Respondents.

BRIEF FOR PETITIONERS.

On certiorari to the District Court of Appeal, Second Appellate District, of the State of California, to review the decision of that Court rendered July 19, 1950 [R. 40], affirming the order of the Superior Court of the State of California, in and for the County of Los Angeles, entered May 25, 1949 [R. 33] denying petitioners' consolidated petitions for writ of mandate [R. 32-33]. A petition for rehearing in the District Court of Appeal was denied on August 8, 1950 [R. 38]. The Supreme Court of California denied a hearing on September 13, 1950, three Justices voting in favor of granting such a hearing [R. 47].

Opinion Below.

The Superior Court rendered no opinion. The opinion of the District Court of Appeal [R. 40-46] is reported in 98 Cal. App. 2d 493. The Supreme Court of California rendered no opinion in entering its order denying a hearing [R. 47].

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U. S. C. 1257(3) and 2101(c). This Court ganted certiorari March 5, 1951.

The judgment of the District Court of Appeal was entered July 19, 1950 [R. 40]. The order of the Supreme Court of California denying a hearing was entered September 13, 1950 [R. 47].

The constitutional issues here presented were argued in the trial court [R. 7-9]; they were argued before the District Court of Appeal on appeal [R. 40-46], and on petition for rehearing [R. 38]; and they were argued before the Supreme Court of California [R. 35-40] which Court declined to grant a hearing thereon [R. 47].

State Action Involved.

The issues presented in this case arise out of a compulsory oath and affidavit required of all city employees, as a condition of continued employment, by the City of Los Angeles. The contents of the oath and affidavit [R. 11-12] are embodied in Ordinance Number 94,004 [R. 11-18] adopted by the Council of the City of Los Angeles on October 21, 1948 [R. 11].[1]

---

[1]Referred to hereafter as "the Ordinance."

Statement of the Case.

There are no disputed issues of fact. The decision of the District Court of Appeal overruled the petitioners' claims that the Ordinance deprived them of federal rights guaranteed by the Constitution of the United States [R. 40-46].

The petitioners' consolidated petitions [R. 1-27] sought restoration to their positions in the classified civil service of the City of Los Angeles from which they had been removed for their failure to comply with the requirements of the Ordinance.

Petitioners are citizens of the United States [R. 1] and permanent civil service employees of the respondent City of Los Angeles [R. 2]. The petitioners have been members of the classified civil service for many years, holding positions ranging from that of tree trimmer in the case of petitioner Reed to that of equipment operator in the case of petitioner Garner [R. 2].

On or about October 21, 1948, the Council of the City of Los Angeles enacted the Ordinance herein [R. 3]. The said Ordinance required employees of the City of Los Angeles to subscribe to an oath of loyalty which included, among other requirements, an affirmation that petitioners had not within a period of five years prior to the effective date of the Ordinance advised, advocated or taught the forcible overthrow of the Government of the United States or of the State of California, or been members of organizations which so advocated, and to execute an affidavit of past and present membership or non-membership in the Communist Party of the United States or the Communist Political Association [R. 18-21].

Fifteen of the petitioners declined to sign either the oath or affidavit [R. 4-5]; two of the petitioners, Ola Ross Pacifico and Frances Schwartz, did sign the oath but not the affidavit [R. 5]. All seventeen were discharged from their civil service employment [R. 4].[2]

The sole charge and ground for discharge was the failure to execute the required oath and affidavit, and in the case of the petitioners Pacifico and Schwartz, the sole charge and ground for discharge was the failure to execute the required affidavit [R. 4-5]. No other charge or ground for discharge of any petitioners was ever asserted or claimed.

Following hearings before the respondent Board of Civil Service Commissioners held on February 10 and February 18, 1949, that Board on March 2, 1949, by one notice addressed to counsel for all seventeen petitioners, sustained each and all of the discharges [R. 25-26].

Each petitioner duly filed a claim for unpaid salaries and an application for reinstatement [R. 6]. On or about March 15, 1949, both the request for unpaid salary and the application for reinstatement were denied by respondents pursuant to the Ordinance [R. 6].

It is alleged in the verified petition and not denied that "but for the matter of asserted failure to comply with the provisions of Ordinance Number 94,004, petitioners

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[2]Rule XVII of the respondent Board of Civil Service Commissioners of the City of Los Angeles provides in part as follows: ". . . but no person in the classified civil service of the city, other than an unskilled laborer employed by the day, shall be removed, discharged or suspended except for cause which shall be stated in writing by the board or officer having the power to make such removal, discharge of suspension, and filed with the Board of Civil Service Commissioners . . ." None of the petitioners was such an unskilled laborer employed by the day.

each performed the services required of him in a competent and satisfactory manner; and petitioners were at all times herein mentioned fit and suitable persons to fill the positions from which they were removed" [R. 6].

As above stated, the petition for writ of mandate was denied by the trial court without opinion; the order of denial affirmed by the District Court of Appeal, Second Appellate District, with opinion; and a petition for hearing denied by the Supreme Court without opinion, three Justices dissenting.

The decision of the court below [R. 40-46] stressed that the "issues involved in this case have been set forth and disposed of in *Steiner v. Darby*, 88 Cal. App. 2d 481" [R. 42]. The court declared that "one of the foundation stones of private business is that the employee must be loyal to his employer" [R. 45] and that "so long as the employment continues, every employer has the right at any time to ask his employee to declare his loyalty" [R. 45]. The court felt that "it is an interesting question whether the legislative power may require disclosure or disavowal of mere beliefs or opinions, without overt acts" [R. 46]. The court concluded that the enactment of the Ordinance was constitutionally within the legislative competence.

Questions Presented.

1. Whether, on its face or as applied in this case, the Ordinance constitutes a bill of attainder and *ex-post facto* law in violation of Article I, Section 10 of the Constitution.

2. Whether, on its face or as applied in this case, the Ordinance deprives petitioners of the liberties of freedom of thought, speech, assembly, association, the right

to privacy of conscience, and the right to petition for redress of grievances, without due process of law in violation of the First and Fourteenth Amendments to the Constitution.

Summary of Argument.

The Ordinance enacted by the Council of the City of Los Angeles is unconstitutional as a bill of attainder and *ex-post facto* law. The reasons for the specific and complete prohibitions against bills of attainder in the federal system lie in the evils of the practices of attainder in English and early American history. These oppressive laws with which the framers of the Constitution were well acquainted, varied in form and content. The persons attained might be specifically named, described as a class, or not named at all. These legislative judgments would include convictions for offenses which ranged from the most heinous to the less serious. The victim was often denied any opportunity to be heard. The judgments might be absolute or conditional. The punishment included death, forfeiture, banishment, disqualification from office, imprisonment, or lesser penalties. The existence of the power in a legislature to enact bills of attainder was held by the founding fathers to be incompatible with the system of government which they created. Express prohibitions were laid upon such measures in the Constitution because they were contrary to the principle of separation of powers, denied to citizens due process of law, the equal protection of the laws, right of trial by jury, substituted the inquisitorial system for the accusatorial system, and arbitrarily imposed punishments and penalties. The decisions of this Court in *Cummings v. Missouri* and *Ex parte Garland*, consistent with the letter and spirit of the Constitution, struck down the provisions for expurgatory oaths

contained in the Missouri statutes. This Court held that the deprivation of any civil right may be punishment, that all avocations are alike open to everyone, and that any deprivation or suspension of any of these rights for past conduct is punishment. The Missouri statutes were held by this Court to presume the guilt of persons and to adjudge the deprivation of their rights unless the presumption be removed by an expurgatory oath. The measures were held by this Court to be bills of attainder and *ex-post facto* laws. There is no essential difference between the Ordinance here and the enactments condemned by this Court in *Cummings v. Missouri* and *Ex parte Garland*. The Ordinance inflicts punishment without the slightest semblance of hearing or trial. The decisions of this Court in *Dent v. West Virginia* and *Hawker v. New York* dealt only with the general power of a state to prescribe qualifications for office. In each of these cases, there could be no disqualification without some form of hearing where judicial safeguards were provided. No expurgatory oaths were involved.

The City of Los Angeles was without constitutional power to require the test oath and affidavit set forth in the Ordinance and petitioners' discharge for failure to execute the said oath and affidavit deprived petitioners of freedom of speech, press, assembly, association and the right to petition without due process of law in violation of the Fourteenth Amendment. In *West Virginia State Board of Education v. Barnette*, this Court held that a state was without power to compel an individual to communicate by word and sign his adherence to government as presently organized. This Court held that compulsion to swear such an oath of adherence was not a lawful means for attaining national unity. A similar adherence and

loyalty is sought here through the medium of a compulsory test oath. The oath and affidavit seek to compel perpetual loyalty to government by extracting a sworn oath that the individual has never in the past and never will express the idea of revolutionary change in government. Compulsory loyalty oaths have no place in the American constitutional system. The history of both England and America is marked by the struggles of men to free their minds from governmental coercion. The American conception of political freedom is that the people are the ultimate source of all political power; that the form of government is republican; and that the powers of government are defined and limited in fundamental constitutional laws designed to safeguard the individual citizen against excessive or arbitrary power. The freedoms embodied in the First and Fourteenth Amendments are entirely withdrawn from governmental control. They are indispensable in a government which exists by consent of the governed. There is no power in government to compel the loyalty of citizens, as this Ordinance does, by suppressing beliefs and opinions that government should be changed. The idea of revolutionary change is imbedded in American tradition and is a fixed constitutional tenet. The right to pursue an avocation or public calling is a fundamental right of all citizens and the exercise of this right cannot be clogged with conditions that are repugnant to their constitutional liberties. A state does not have unlimited police power with respect to its citizens, or any class of citizens. There are limits marked by the Constitution. Even if the inculcation of loyalty of citizens in government employ is a permissible end, the instrumentality of the compulsory test oath is not a lawful means for obtaining such a result in the light of the liberties secured by the Fourteenth Amendment.

ARGUMENT.

I.

The Ordinance Enacted by the Council of the City of Los Angeles Is Unconstitutional as a Bill of Attainder and Ex Post Facto Law.

It is provided in Article I, Section 10 of the United States Constitution that "No State shall—pass any bill of attainder, *ex post facto* law. . . ." A similar limitation upon the federal government is also contained in the fundamental law. Article I, Section 9, cl. 3. The reasons for this specific and complete prohibition in the federal system lie in the evils of the practices of attainder in English and early American history with which the members of the Constitutional Convention were well acquainted, and in the underlying postulate of the Convention that the United States would be a republican form of government, one prerequisite of which was the separation of exclusively judicial power from the legislative agencies of government.

> "Why did the authors of the constitution turn their attention to this subject, which, at the first blush, would appear to be peculiarly fit to be left to the discretion of those who have the police and good government of the state under their management and control? The only answer to be given is, because laws of this character are oppressive, unjust and tyrannical; and as such, are condemned by the universal sentence of civilized man."
>
> *Ogden v. Saunders*, 12 Wheat. (U. S.) 213, 266.

> "It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of these rules to individuals in society would seem to be the duty of other departments."
>
> *Fletcher v. Peck*, 6 Cranch (U. S.) 87, 136.

A. Background of the Provisions Against Bills of Attainder and Ex Post Facto Laws.

1. The variety of forms which bills of attainder and bills of pains and penalties took in the enactments by Parliament precludes the view that there was any "classical" model of this evil so universally condemned at the Constitutional Convention. Hatsell, John, Precedents of Proceedings in the House of Commons (Lond. 1796), vol. IV, pp. 77-93. The persons attained might, as shall hereafter be shown, be specifically named, described as a class, or not named at all. The judgments of Parliament would include convictions for offenses which ranged from conspiracy through such substantive crimes as treason, misprision of treason, poisoning or attempted poisoning, adultery, desertion and other related offenses. In some cases, Parliament would offer the alleged offender some opportunity to defend, before the enactment of the law; in other cases, the victim was specifically denied any opportunity to be heard. Some laws declared judgment absolute; other laws declared persons guilty of the offenses unless upon a certain day they appeared and proved their innocence. The punishment might be death, corruption of blood, forfeiture, banishment, disqualification from office, imprisonment, or lesser penalties. Hatsell, John, Precedents of Proceedings in the House of Commons, *supra*. "After the precedent had been introduced, they went on through the whole of this reign attaining persons in a summary general way. the number of which it would be tedious and disgusting to recount." Reeves, John, History of the English Law (Lord. 1787), Ed. 2, vol. IV, p. 410.

The word *attaint* appears early in English history in two separate aspects. The writ of attaint appeared as early as 1202. Holdsworth, William, A History of English Law

(Bost. 1938), 6th Ed. vol. 1, p. 337. "When the character of the jury as witnesses was more prominent than their character as judges of the facts, they were obviously guilty of something like perjury if they gave a false verdict. It was to punish jurors who had thus perjured themselves that the writ of attaint was invented." Holdsworth, William, A History of English Law, *supra*, p. 337. "And seeing all trials of real, personal and mixed actions depended upon the oath of twelve men, prudent antiquity inflicted a strange and severe punishment upon them, if they were attainted of perjury." Coke's First Institutes (Thomas, Lond. 1818), vol. III, p. 510. The writ of attaint, however, was issued by the chief justice at a general Eyre or by the Chancellor only when a *prima facie* case was made out, and the original jury could not be attainted, except after trial and verdict by a second jury known as the attainting jury. When in subsequent times the jurors lost their character as witnesses and took on the form of the modern jury the writ of attaint fell into disuse. "The greatest changes in the law as to attaint were due, firstly, to the extension of the remedy by the legislature, and, secondly, to the growth of a disinclination to treat the jury merely as witnesses." Holdsworth, William, A History of the English Law, *supra*, p. 339.

However cruel and oppressive may have been the practice of attainting juries for "false" or "corrupt" verdicts, it is important to observe that the common law withheld any punishment until there had been a trial before a second jury. In England, the common law courts would render judgments of convictions in many other cases where attainder would flow as a consequence, but this occurred only upon a judgment rendered after trial and upon conviction. "He is then called attaint, *attinctus*, stained or blackened."

Blackstone's Commentaries (Lond. 1818), Book IV, p. 380.

Moreover, until the reign of Henry VIII, the attainders in parliament usually were preceded by some notice to the alleged offender, and even opportunity to defend or be defended. Reeves states that bills of attainder were resorted to "either to confirm a sentence already passed in some court of law; or to ensure the destruction of such as might possibly escape by the openness of a common-law trial." History of English Law (Lond. 1787), Ed. 2, vol. IV, p. 408. There is mention in the text books of the appearances of witnesses, examinations by Star Chamber, and pleas before the House before the passage of a bill of attainder.

It was, however, in the twenty-ninth year of the reign of Henry VIII, that a new practice of attainting persons was introduced. The King desired the destruction of the Countess of Salisbury who had become personally obnoxious to him because of her religious leanings. Charges of various kinds were drawn up against her. "These charges, however, could not be sufficiently proved, might be invalidated by her, or would not reach her life. This determined the King to procure her destruction in a more decisive and summary way than had been hitherto used." Reeves, John, A History of English Law, *supra*, p. 409.

Cromwell was dispatched by the King to consult the judges as to whether parliament could attaint persons without trial or citing them to appear and defend themselves. The judges answered "that it was a dangerous question; and that the High Court of Parliament ought to give examples to inferior courts for proceeding according to justice; and that no inferior court *could* do the like; and they thought the High Court of Parliament,

would never do it." Hatsell, John, Precedents of Proceedings in the House of Commons (Lond. 1796), vol. IV, p. 85, footnote. The King, however, commanded a more explicit answer from the judges. Their reply was, "That if he be attainted by Parliament, it could not come in question afterward, whether he were called or not called to answer." Hatsell, *supra*, p. 86, footnote. Reeves, John, History of the English Law, *supra*, p. 409. The floodgates had been opened.

So callous did this procedure become that the Lord Chancellor could declare to both Houses that a bill of attainder against the Duke of Norfolk must be expedited without delay because "the King wished to confer the offices which the Duke held, chose some other person, who might execute the same at the approaching ceremony of the coronation of his son Edward, Prince of Wales." Hatsell, *supra*, p. 86, footnote.

Thus, until Henry VIII's reign it had not been clear that the law would admit the validity of an Act of Attainder passed without hearing the accused in his defense. "But in Henry VIII's reign it was realized that Acts of the Parliament, whether public or private, were legislative in character; and the judges were obliged to admit that these Acts, however morally unjust, must be obeyed." Holdsworth, William, A History of English Law (Lond. 1924), Vol. IV, p. 185. Blackstone, though probably recognizing the validity of this proposition, could not refrain from writing: "As for acts of parliament to attaint particular persons of treason or felony, or to inflict pains

and penalties, beyond or contrary to the common law, to serve a special purpose, I speak not of them; being to all intents and purposes new laws, made *pro re nata*, and by no means an execution of such as are already in being." Commentaries (1818), Book IV, p. 259.

Of the particular examples of bills of attainder and bills of pains and penalties, a few may be noted here. Macauley relates (History of England (Lond. 1914), vol. 3, pp. 1503-1506) how the great Act of Attainder was enacted by the Irish Parliament, with the assent of King James:

> "A list was framed consisting between two and three thousand names. At the top was half the peerage of Ireland. Then came baronets, knights, clergymen, squires, merchants, yeomen, artisans, women, children. No investigation was made. Any member who wished to rid himself of a creditor, a rival, a private enemy, gave in the name to the clerk at the table, and it was generally inserted without discussion . . . Days were fixed before which those whose names were on the list were required to surrender themselves to such justice as was then administered to English Protestants in Dublin . . . That nothing might be wanting to the completeness of this great crime, extreme care was taken to prevent the persons who were attainted from knowing that they were attainted, till the day of grace fixed in the Act was passed. The roll of names was not published, but kept carefully locked up in Fitton's closet. Some Protestants, who still adhered to the cause of James, but who were anxious to know whether any of their friends or relations had been proscribed, tried hard to obtain a sight of the list; but solicitations, remonstrance, even bribery, proved vain. Not a single copy got abroad till it was too late for any of the thousands who had been condemned without a trial to obtain a pardon."

That bills of attander were used indiscriminately by friend and foe alike, dependent upon the political weather, is clear from a reading of English history. Thus, an adherent of King James, Sir John Fenwick, was put to death upon judgment of conviction by an Act of Parliament in the reign of William, The Third. Macauly, History of England, *supra,* vol. 6, p. 2687. Fenwick, as a matter of fact, had been indicted by a grand jury and charged with high treason. Before trial, however, one of the two witnesses against Fenwick disappeared.

> "This event exasperated the Whigs beyond measure. No jury could now find Fenwick guilty of high treason. Was he then to escape? Was a long series of offenses against the State to go unpunished, merely because to those offenses had now been added the offense of bribing a witness to suppress his evidence and to desert his bail? Was there no extraordinary method by which justice might strike a criminal who, solely because he was worse than other criminals was beyond the reach of the ordinary law? Such a method there was, a method authorized by numerous precedents, a method used both by Papists and by Protestants during the troubles of the sixteenth century, a method used both by Roundheads and by Cavaliers during the troubles of the seventeenth century, a method which scarcely any leader of the Tory party could condemn without condemning himself, a method of which Fenwick could not decently complain, since he had, a few years before, been eager to employ it against the unfortunate Monmouth. To that method the party which was now supreme in the State determined to have recourse."
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> Macauley, *supra,* vol. 6, p. 2660.

The method, of course, was Bill of Attainder. The House dispensed with the testimony of two witnesses. It heard one, and took secondary evidence of the other. Fenwick offered no evidence in his behalf. Whigs and Tories debated the "verdict" with an eye to the populace, rather than the evidence. In vain did the friends of Fenwick "set forth the danger of breaking down the partition which separates the functions of the legislator from those of the judge," *supra*, p. 2669. The answer of the Tories was exemplified by this statement in the House, ". . . in order that the fear of a righteous punishment may restrain those enemies of our country who wish to see him [James] ruling in London as he ruled at Dublin, I give my vote for this bill." *supra*, p. 2672.

The variety of forms which bills of attainder assumed may be further noted by particular statutes set forth hereafter which in some manner bear upon the issues involved herein. Death was not always the consequences of an attainder. By stat. 16, Rich. II, ch. I, the penalty ordained was that the offenders were to be put out of the King's protection, to forfeit their lands and goods, to be detained and imprisoned at the King's pleasure; and if the offenders were not found they were to be outlawed.

By the act of 5 Eliz. ch. I, it was enacted "that every person, who by writing, printing, teaching, preaching, or by deed or act setting forth and maintaining the jurisdiction and power of the bishop of Rome, etc., their aiders and abettors, should incur the penalties prescribed by statute of 16 Rich. II. By sec. 5, all officers in the Kingdom of every description, all officers in the church, all persons admitted to degrees in the universities, all schoolmasters and public and private teachers of children, were to take the oath of abjuration and allegiance prescribed by Stat.

1 Eliz. ch. 1, sec. 19; and by sec. 8 it was provided that all persons refusing to take such oaths, and convicted or attainted at any time thereafter, should suffer the penalties prescribed by statute of 16 Rich. II; and by sec. 10 for refusing to take such oath when tendered the second time, they were to suffer the penalties of treason.

The attaints were not always for the usual acts of treason. Act 28 Henry VIII, ch. 12 attainted Elizabeth Buxton and others for slandering the divorce of Henry from Catherine of Aragon and his marriage with Anne Boleyn. Act 33 Hen. VIII, ch. 20 attainted Queen Catherine Howard for incontinence, and forfeited the property of herself and her accomplices to the King. Act 3, Ed. VI, ch. 17, confirmed the attainder of William Sherrington for counterfeiting the coin. Thomas Cromwell, Earl of Essex, 32 Henry VIII, ch. 60, was attainted for heresy. By Act 11 George III, ch. 55, J. Burnett and sixty-seven others named were incapacitated from voting at elections for members of Parliament. By stats. 9 and 10 William III, ch. 32, any person who denied the truth of the State religion or the divine authority of the Scriptures, was for the first offense rendered incapable to hold any office or place of trust; and for the second, rendered incapable of bringing any action and subjected to imprisonment without bail. By stat. 1, George I, refusing or neglecting to take certain prescribed oaths, was punished by incapacity to hold any public office; to prosecute any suit; to be a guardian; to take any legacy; to vote at any election; and the offender was also subject to a forfeiture of five hundred pounds to anyone who would sue for the same.

The attainder of Thomas Fitzgerald, Earl of Kildare (26 Henry VIII, ch. 25) attainted, first, the Earl, and deprived him of his estates, titles, etc. Section 2 declared

that all "comfortors, partakers, abettors, confederates and adherents" shall likewise stand attainted. By Section 3, it was provided that the same attainder against the said abettors, etc., shall be as effectual as if they had been "particularly named by their proper names and surnames in this said Act." Section 7 provided that the attainder is not to be "hurtful or prejudicial" if they submit by a presignified day to the King or his lieutenant. Some two years later, another bill of attainder (28 Hen. VIII, ch. 18) against the same Thomas Fitzgerald and his uncles omitted the former section 7.

The statute 19, Car. II adjudged the Earl of Clarendon a banished man for life, if he did not return to England within a certain period and surrender himself for trial. 9 Geo. I, ch. 18 ordered Bishop Atterbury to deport the realm on or before a fixed day; sentenced him to perpetual exile and deprived him of all his offices, dignities, etc. By an Act of Parliament (July 15, 1321), after reciting several crimes committed by a father and son, Parliament disinherited them forever and banished them never to return unless by assent of the King (Hatsell, *supra*, p. 91). In January, 1549, a bill was passed disinheriting for life William West, for having attempted to poison the Lord Larran (*supra*, p. 92). On March 7, 1556, a bill debarred the divorced wife of the Earl of Sussex from her dower "in case she shall not repair into the Realm, within a time limited, and make her purgation before the Bishop of her diocese." (*Supra*, p. 92.)

It will thus be observed that bills of attainder and pains and penalties in England varied considerably in form and content. Even if the crimes were fully established to the satisfaction of Parliament, new innovations were made respecting such crimes. Neglect to surrender by an appointed

day constituted a new treason against which the attaint was directed. In other cases, as in the persecution of the Earl of Strafford, a statute would determine those things to be treason which by no prior law or adjudication could be or had been so declared. The case of Sir John Fenwick illustrates the energy of legislative power exerted on the rules of evidence. In many other instances, the legislature created new innovations in the punishments inflicting forfeitures or disabilities not incurred in the ordinary courts of law. Wooddeson, Richard, A Systematical View of the Laws of England (Vinerian Lectures) Lond 1792, Vol. 2, pp. 625-640. The learned author, concluding his lecture on bills of attainder and bills of pains and penalties, observed:

> "It must be admitted, that in all penal statutes passed *ex post facto*, except where the innovation *mollifies* the rigor of the criminal code, justice wears her sternest aspect. Moral conscience and human frailty have no longer the additional guidance of the law. . . . All civil magistracies have in reason their appointed province. The Legislature ought not to intrench on the judicial. . . . Hence the political congruity of first enacting laws, and then enforcing them on subsequent occasions, and by different magistrates, has been confirmed by the constant usage of the world; in the observance of which, the subjects of every state have been thought deeply interested. . . . The extravagant author of Leviathan writes that traitors, like public enemies, may be punished in an arbitrary manner. . . . But here the same dangerous latitude of sudden discretion is exercised, unless an express and general law had previously defined by what particular acts a citizen might become *bostis reip.* And what particular treatment he should ac-

cordingly receive. . . . Discretionary severities inflicted by particular statutes, would probably be both inexpedient and unjust."

Wooddeson, supra, pp. 641-646.

2. American colonial and revolutionary history is also a part of the background which affected the thinking of those who gathered at the Constitutional Convention in 1787. "They had lived through bitter years, when they had seen Governments, both Royal and State, trample on the human rights which they and their ancestors in the Colonies and in England had fought so hard to secure. In the seven years prior to the signing of the Federal Constitution, they had seen the Legislatures of four States—New Jersey, Rhode Island, New Hampshire and North Carolina—deprive their citizens of the right to jury trial in civil cases. They had seen the State Legislatures of Virginia, Pennsylvania and other States pass bills of attainder sentencing men to death or banishment without a criminal trial by jury." Warren, Charles, Congress, The Constitution and The Supreme Court (Bost. 1930), p. 81.

The fact is that during the American Revolution, so intensified was popular feeling, every one of the thirteen colonies enacted bills of attainder against the Loyalists.[8] The form and content of these measures were as varied as those which had existed in England, and as arbitrarily and ruthlessly enforced. Legislation was passed in every state declaring the loyalists "guilty of such atrocious and

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[8]The statutes are collected in Van Tyne, C. H., The Loyalists in the American Revolution (N. Y. 1902), Appendix. The author notes (p. 330): "Disfranchisement and removal from office were common penalties in the Revolutionary Days." See also, Thompson, J. W., Anti-Loyalist Legislation During the American Revolution, in 3 Ill. L. Rev. 81, 147 (1908).

unnatural crimes against their country that every friend of mankind ought to forsake and detest them." The punishment was confiscation of all their property. Thompson, J. W., Anti-Loyalist Legislation During the American Revolution in 3 Illinois Law Rev. 81, 147.

Massachusetts set the pattern, later followed by other states, of prescribing an oath of fidelity and allegiance, and persons refusing to take the same were to be committed to prison and deported within forty days. (Thompson, J. W., *supra,* p. 148.) Interdiction by name was frequent. By the famous Act of banishment of September, 1778, 308 persons were banished. "It is well that Massachusetts was fertile in able men. Few commonwealths could have borne so large an excision of its intelligent and industrious population." Thompson, J. W., *supra,* p. 149, New Hampshire proscribed seventy-six citizens and confiscated the property of twenty-six of them. New York authorized the "commissioners of conspiracies" to cause persons of neutral and equivocal character in the state to take an oath or affirmation of fealty to the new government and on refusal to send them within the enemy's lines and to double forever all taxes on their lands. (*Supra,* p. 153.) Loyalists were punished for remaining on territory overrun by the British and declared to be "without the protection of the laws." "In effect this act expelled a large number of citizens without a hearing and disfranchised them in the face of the constitution [New York], without the judgment of their peers and contrary to the law of the land." *Supra,* p. 153.

The measures ran the gamut. Not a single profession, business or trade was left untouched. Failure to take all kinds of oaths of loyalty and fidelity resulted in deprivation of office, profession or trade, imprisonment, confiscation and banishment. Laws were passed specifically depriving persons of their office by name. New York required lawyers to produce a certificate of attachment to the "liberties and independence of America." Those who failed to do so had their licenses suspended. Laws were passed in a number of states attaining "divers traitors" unless they surrendered to the state authorities before a given date.

Van Tyne, C. H., The Loyalists in the American Revolution (N. Y. 1902).

When peace was concluded between the United States and Great Britain, the preliminary articles provided for the restoration of confiscated property and the prohibition of further prosecutions. This was more honored in the breach than in the observance. Jay wrote to Elbert Benson from Europe in 1783:

> "Your irregular and violent popular proceedings and resolutions against the Tories hurt us in Europe. We are puzzled to answer the question, how it happens that if these be settled governments in America, the people of town and district should take upon themselves to legislate." Thompson, J. W., *supra*, p. 1 7.

3. It was in the light of this background that the constitutional provisions were adopted. (Cooley, Thomas M., Constitutional Limitations (Bost. 1927), 8th ed., Vol. 1, pp. 536-540.) The decision of the Constitutional Conven-

tion to insert a prohibition against bills of attainder, both as to the federal and state governments, was adopted without dissent. Debates in the Federal Convention reported by James Madison (New York, 1920), Hunt & Scott Int. ed., pp. 449, 567. "The conviction of the propriety of this constitutional provision has been so universal, that it has never been questioned, either in legislative bodies or elsewhere." Cooley, Thomas M., *supra*, Vol. 1, p. 539.

It is clear that the existence of the power to enact bills of attainder was incompatible with the entire system of government which the founding fathers created. There was implicit in such measures a complete failure of due process, denial of equal protection of the laws, denial of the right of trial by jury, the substitution of the inquisitorial system for the accusatorial system, arbitrary imposition of punishment and penalties—in short, a despotism of men and not a government of laws. And this was all the more despicable, in the opinion of the founding fathers, because all of this was accomplished through the guise of a "law." As Madison stated,

> "Bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the state constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favor of personal security, and private rights; and I am much deceived if they have not, in so doing, as

faithfully consulted the genuine sentiments as the undoubted interests of their constituents." The Federalist, No. XVIV.[4]

In thus making a clear sweep of the sanguinary and oppressive relics of the past, it is safe to say in the light of history and the harmonizing sentiments of the day that the framers of the Constitution intended that no punishment, penalty or disability, great or small, total or conditional, immediate or suspended, should be imposed under our law except through action by some agency exercising judicial powers and observing the rules and safeguards of fair hearing and trial. The legislature was not to adjudicate individual causes, civil or criminal, or to impose upon named or identified individuals or groups punishment, penalty or disability of any kind. If the legislatures of the several states, or the federal government, could subvert this principle, directly or indirectly, the union would be dissolved.

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[4]When Madison wrote that bills of attainder were "prohibited by the spirit and scope" of all the state constitutions, it was clear that he was referring principally to the doctrine of separation of powers. In subsequent issues of the Federalist No. XLVII and No. XLVIII, he stressed that the system of checks and balances created by the Constitution did not violate the principle, but were intended to prevent encroachment by one arm of government upon another. He agreed that "the accumulation of all powers, legislative, executive and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." No. XLVII. This pervasive truth has also marked the decisions of this Court. "The doctrine of separation of powers is fundamental in our system. It arises, however, not from Art. 3 nor any other single provision of the Constitution, but because 'behind the words of the constitutional provisions are postulates which limit and control.'" *National Mutual Ins. Co. v. Tidewater T. Co.*, 337 U. S. 582, 590. See also, Green, Frederick, Separation of Governmental Powers in 4 Selected Essays on Constitutional Law (1938), Book 4, pp. 195-218; Pound, Roscoe, Justice According to Law, in 14 Col. L. Rev. 1, 7-11 (1914).

B. The Decisions of This Court in Cummings v. Missouri and Ex Parte Garland.

The year when these two landmark decisions were rendered by this Court was 1866. In the eighty-five years which have passed since the rendition of these opinions this Court has never failed to reaffirm their validity. This has been true of majority and differing opinion alike. See, for example, *United States v. Lovett*, 328 U. S. 303. No dispassionate examination of the constitutional history of America and England can lead to any other conclusion but that these decisions were consistent with the intent of the founding fathers and the spirit and letter of the constitutional prohibition.

The decisions were rendered under circumstances which put to the test the very principles which the constitution had ordained should govern all society. A great Civil War had just ended. Hostility towards those who had participated or sympathized with the rebellion was intense. How were these disloyal elements to be punished for their alleged offenses? In most cases, there was no evidence to support any criminal charge. Many of the acts with which they were charged had never been deemed criminal. Witnesses were not available. Only one method remained—the method of attainder.

We consider the crux of this Court's decisions in the *Cummings* and *Garland* cases to lie in the following portion of the decision:

> "The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name It intended that the rights of the citizen

should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be ended by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding." (P. 325.)[5]

For the statutes which were enacted in 1866 were in fact the crudest versions of bills of pains and penalties to appear in the long history of measures of that type. The statutes were clearly intended to inflict the penalty of disqualification from office upon identified classes of persons because, in the judgment of the legislature, they had committed criminal offenses—or offenses which ought to be called criminal. By force of the statute, the victims were ferretted out and because of their "misdeeds," perpetually excluded from their chosen avocations. In all of this, not the slightest opportunity to defend or be heard was offered. Parliament under James or Henry in many cases was more

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[5]This Court has emphasized that when the intent, operation or effect of a statute is to evade constitutional limitations, the statute will not be upheld, no matter what device or form of legislative enactment is utilized. It is not a question of the personal motivations of the legislators nor the alleged lawfulness of purpose. It is not to be expected that anyone will ever candidly concede the intent to violate the fundamental law; indeed, he may believe that he has no such purpose. "It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*" *Boyd v. United States*, 116 U. S. 616, 635. If this were not so, life, liberty and property would be subject to deprivation without due process of law by every subterfuge which the ingenuity of man can devise and this Court's function under the Constitution would become meaningless. This is the basic rationale of such decisions by this Court as *Brown v. Maryland*, 12 Wheat. (U. S.) 419; *Collins v. New Hampshire*, 171 U. S. 30; *Fairbanks v. United States*, 181 U. S. 283; *Bailey v. Alabama*, 219 U. S. 219; *Macallen Co. v. Massachusetts*, 279 U. S. 620; *United States v. Constantine*, 296 U. S. 287; *Near v. Minnesota*, 283 U. S. 697; *Grosjean v. American Press Co.*, 297 U. S. 233. See, concurring opinion of Justice Jackson in *Thomas v. Collins*, 323 U. S. 516, 547.

moderate than this. Despite the arguments of counsel for the State in the *Cummings* and *Garland* cases (state's rights; police powers; privilege; expediency; security of the State, pp. 295-306, 352-364), this Court recognized that behind the facade of the statute lay a plain violation of the Constitution.

The Constitution of Missouri was amended in June, 1865. By the amendments all those persons in the State of Missouri who had ever actively aided or abetted the rebellion, or sympathized therewith, or "been a member of, or connected with any order, society or organization, inimical to the government of the United States" were held incapable of holding office, of acting as a teacher, of holding real estate, of managing a corporation, etc. (p. 279-280). The intent of the law was manifest.

By another section added to the Constitution (Sec. 6) an Oath of Loyalty was prescribed. Included in it was the affirmation that the Constitution, as amended in 1865, had been read by the affiant and that he had "never, directly or indirectly, done any of the acts in said section specified." (P. 280.)

By a third section (p. 281) it was provided that all the classes of persons mentioned in the Constitution within sixty days after the effective date should subscribe the Oath of Loyalty. Failure to comply resulted in immediate vacancy in the office. It was made punishable to practice one's profession without having taken the oath, and a false oath was declared to be perjury. These provisions are noted because of the bearing they have upon the Ordinance involved here.

The following propositions were set forth by this Court:

1. The deprivation of any rights, civil or political, previously enjoyed may be punishment, the circumstances attending and the causes of the deprivation determining the fact.

2. All avocations are alike open to every one, and that in the protection of those rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment.

3. A bill of attainder is a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. These bills may be directed against individuals by name; but may be directed against a whole class.

4. The amendments to the Constitution of Missouri in plain operation and effect presume the guilt of persons, adjudge the deprivation of their right to their professions unless the presumption of guilt be removed by an expurgatory oath. The measure is a bill of attainder.

5. The legal result is the same whether the legislature openly adjudges guilt or covertly assumes it.

6. The Constitution of Missouri punishes acts previously innocent; imposes additional punishment for existent offenses; subverts the presumption of innocence and alters the rules of evidence which govern all common law countries—the accusatorial and not the inquisitorial method. The law is, therefore, an *ex post facto* law.

Justice Field, in answer to the argument of the State that the statute merely prescribed qualifications for office, noted that many of the acts named in the statute appeared to have no relation to fitness for office. This was one aspect which convinced this Court that the measure was intended to inflict punishment upon individuals. But it was not the sole aspect, nor the crucial one. This Court emphasized (pp. 328 and 329) that even if the criminal offenses were separated from the acts deemed innocent, and enacted into two separate laws, still the intent to inflict a penalty would remain. "They impose the same penalty without the formality of a judicial trial and conviction; for the parties embraced by the supposed enactments would be incapable of taking the oath prescribed; to them its requirement would be an impossible condition." (P. 329.)

This emphasis was repeated in the *Garland* case:

> "The statute is directed against parties who have offended in any of the particulars embraced by these clauses. And its object is to exclude them from the profession of the law, or at least from its practice in the courts of the United States. As the oath prescribed cannot be taken by these parties, the act, as against them, operates as a legislative decree of perpetual exclusion. And exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct. The exaction of the oath is the mode provided for ascertaining the parties upon whom the act is intended to operate, and instead of lessening, increases its objectionable character." (P. 377.)

As Justice Frankfurter observed in his concurring opinion in *United States v. Lovett*, 328 U. S. 303, 327:

> "While the provisions involved in those cases did not condemn or punish specific persons by name, they proscribed all guilty of designated offenses. Refusal to take a prescribed oath operated as an admission of guilt and automatically resulted in the disqualifying punishment. Avoidance of legislative proscription for guilt under the provisions in the *Cummings* and *Garland* cases required positive exculpation. That the persons legislatively punished were not named was a mere detail of identification. Congress and the Missouri legislature, respectively, had provided the most effective method for identification."

And in *American Communications Association v. Douds*, 339 U. S. 382, this Court again stated (p. 414):

> "In the cases relied upon by the unions on the other hand, this Court has emphasized that, since the basis of disqualification was past action or loyalty, nothing that those persons proscribed by its terms could ever do would change the result."

The essential holding of the *Cummings* and *Garland* cases, it is respectfully submitted, is that it is not within the province of a legislature to impose penalties or disabilities upon named persons, or easily identifiable persons for conduct deemed by the legislature to be inimical to the State. Such conduct may or may not have relation to fitness for office, be innocent or criminal, but if the parties are to be excluded from their professions because of such conduct, then the penalty can only be imposed by some

agency exercising judicial powers and observing the rules and safeguards of fair hearing and trial.[6]

C. The Ordinance Enacted by the City Council of the City of Los Angeles.

There is no essential difference between the Ordinance here and the enactments condemned by this Court in *Cummings v. Missouri* and *Ex parte Garland*. The plain operation and effect of the Ordinance, on its face, demonstrates a legislative purpose to inflict punishment without a judicial trial.

Before proceeding to an analysis of the measure, we would respectfully call the attention of the Court to the following allegation in petitioner's application [R. 1-27] for a writ of mandate [R. 6]:

"X.

"Since the date of their discharges, petitioners have not been employed in their regular positions, or in any position, for the City of Los Angeles, but on the

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[6]See also, *In re Shorter* (D. C. Ala. 1865), Fed. Cases No. 12,811; *Ex parte Law*, 35 Ga. 285, Fed. Cases No. 8,126; *Green v. Shumway*, 39 N. Y. 418, 36 How. Pr. 5; *Murphy and Glover Test Oath Cases*, 41 Mo. 340; *State v. Heighland*, 41 Mo. 388. The cases are collected in the annotation in 86 L. Ed. 1267-1294. While exclusion from office without judicial hearing because of past conduct is conclusive evidence of an intent to inflict punishment, it does not follow that exclusion without judicial hearing for present and future conduct may not also reflect such intent. If a statute required all federal judges to take an oath that they are not over 45 years of age, and that failure to take the oath would result in dismissal, it would be an attainder. If an ordinance required all employees to take an oath that they are not members of the Jewish faith, and failure to take the oath resulted in dismissal, that, too, would be an attainder. The importance of emphasizing past conduct is that it patently establishes the intent to inflict punishment, coupled, of course, with the failure to provide any judicial hearing before the punishment.

contrary have been refused work and are not now permitted to work and are not now working for said respondent, City of Los Angeles, in any position.

"That but for the matter of asserted failure to comply with the provisions of Ordinance Number 94,004, petitioners each performed the services required of him in a competent and satisfactory manner; *and petitioners were at all times herein mentioned fit and suitable persons to fill the positions from which they were removed.*" (Emphasis supplied.)

This allegation is admitted by the pleadings. It is thus admitted, at least by the pleadings, that the doctrines and affiliations proscribed in the Ordinance have no relation to the fitness of the petitioners to fill the positions from which they were removed. This is a preliminary aspect of the question as to whether the Ordinance here is intended to inflict punishment without judicial trial.

The preamble in the Ordinance [R. 11] declares that it is an ordinance "to effectuate the provisions of Charter Section 432 and otherwise to insure the loyalty of the officers and employees of this City." The manifest intent of the Ordinance is, therefore, at least to carry out the provisions of the Charter.

Section 432 of the Los Angeles City Charter provides:

"Notwithstanding any other provisions of this Charter, no person shall hold or retain or be eligible for any public office or employment in the service of the City of Los Angeles, in any office or department thereof, either elective or appointive, who has within five (5) years prior to the effective date of this section advised, advocated or taught, or who may, after this section becomes effective, advise, advocate or teach, or who is now or has been within five (5) years

prior to effective date of this section, or who may, after this section becomes effective, become a member of or affiliated with any group, society, association, organization or party which advises, advocates or teaches, or has, within said period of five (5) years advised, advocated, or taught the overthrow by force or violence of the government of the United States of America or of the State of California.

"Insofar as this section may be held by any court of competent jurisdiction not to be self-executing, the City Council is hereby given power and authority to adopt appropriate legislation for the purpose of effectuating the objects hereof."

Section 432, therefore, perpetually excludes from public office or employment any person, or member of any organization, advocating the forcible overthrow of government. It does more. It declares that if the Section is held not to be "self-executing" by any Court, then the City Council is to adopt appropriate legislation "for the purpose of effectuating the objects hereof." Those "objects" are to exclude a class of persons from public employ. The Ordinance here openly stated that it is intended "to effectuate" the objects of the Charter provision. It is the intent of the Ordinance to "execute" the Charter provisions by effecting the perpetual exclusion of those who fall within the proscribed classes. How is this to be accomplished?

The Ordinance requires an oath [Sec. 1, R. 11] phrased in the language of the Charter provision from every person who holds or occupies a position in the service of the City [Sec. 2, R. 12] affirming that he has not in the past five years advocated, does not now, and will not in the future advocate the proscribed doctrines, and has not been in the past five years, and is not and will not be a member of an organization which so advocates.

The Ordinance also requires that the same persons execute an affidavit stating whether or not they are or ever were members of the Communist Party of the United States of America or of the Communist Political Association and if they are or were such members, the dates and periods in which they were such members.

As to the oath requirement, it is clear that it falls precisely within the form of enactment condemned in the *Cummings* and *Garland* cases. It deals with past activities, as well as present and future activities. The exclusion intended is perpetual. The Ordinance assumes that there are employees guilty of the offenses proscribed in the Charter. Otherwise, this Ordinance "to effectuate" the Charter would have no meaning. The Ordinance is aimed at past acts. It is intended to operate upon any employee who has in the past advocated or belonged to an organization which advocated the forcible overthrow of the government. It is intended to deprive such persons of their offices. Such deprivation is punishment. The only method of exculpation is by the expurgatory oath. For those who are unable to take the oath, there is no exculpation. To them the deprivation was intended to be, and is, absolute and perpetual.

The affidavit requirement in the Ordinance concerning past and present membership in the Communist Party and the Communist Political Association is affected with the same infirmities. There is a difference in form, but not in substance.

Obviously if the Ordinance is designed to effectuate Section 432 it means that if anyone were to admit membership in the proscribed organizations at any time in the past, such person could not continue to be employed. If the Ordinance be not so construed and if an admitted

Communist could continue in employ, then the whole Ordinance becomes bereft of all meaning. The City has asserted that failure to state whether an individual ever was a Communist establishes one's "treasonable" character and unfitness for public employment. Would such an admission of odious conduct make the person involved any more desirable than one who is presumed "treasonable" because he has failed to execute the affidavit? Surely the City cannot seriously so contend, particularly when it has admittedly already discharged two of the petitioners who did sign the force and violence section but did not sign the non-Communist section.

Moreover, an additional vice attends the affidavit section of the Ordinance. It must be emphasized that the entire Ordinance is intended to effectuate the purposes of the Charter provision and otherwise insure the loyalty of the employees. The Charter speaks only in generic terms of organizations which have advocated the forcible overthrow of government. The legislature here, in effectuating the purposes of the Charter has made a "determination" that the Communist Party and the Communist Political Association are organizations which have in the past and do now advocate the proscribed doctrines and that they have been and are disloyal. It is submitted that such a judicial determination can never be made by the legislative arm of government.

> "The Legislature, however, is without power to determine that a particular person or group has advanced the doctrine which violates the policy laid down in the statute. If the statute be interpreted to

include the implied finding here in question, as contended by defendants, it would mean that the Legislature had determined that a special group had violated the general policy of the statute. Such legislation would be clearly unconstitutional."

Communist Party v. Peek, 20 Cal. 2d 536, 549, 127 P. 2d 889.

That it is not within the province of a legislature to declare persons guilty or presumptively guilty of offenses has been settled by this Court.[7]

It is submitted, therefore, that the Ordinance here on its face, evinces a clear intent to inflict punishment by permanently depriving persons of their avocations. That dismissal follows upon failure to take the oath without the slightest semblance of hearing or trial is also clear from the statute. Since the Ordinance states in the preamble that it is effectuating the Charter provision, and since the oath and affidavit are the methods for executing Section 432 is clear that no one can be retained who fails to comply with the Ordinance. Moreover, Sections 2 and 4 [R. 12] of the Ordinance state that the oath and affidavit "must" be executed within 30 days after the effective date of the Ordinance. Section 8 of the Ordinance provides:

"It shall be the duty of each appointing power to require each officer or employee to execute and file an oath and affidavit as required hereby."

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[7] *McFarland v. American Sugar Refining Co.*, 241 U. S. 79; *Bailey v. Alabama*, 219 U. S. 219; *Manley v. Georgia*, 279 U. S. 1; *Western and Atl. R. R. Co. v. Henderson*, 279 U. S. 639; *Tot v. United States*, 319 U. S. 463.

Sections 9 to 23 of the Ordinance provide for investigations and determinations relative to the falsity or violation of oaths which have been filed.[8] There are no such provisions for those who have failed to execute the oath or affidavit. The only conclusion which can be drawn from an examination of the entire Ordinance is that those who do not comply are automatically dismissed.

As further bearing on the intent, operation and effect of the Ordinance we believe it appropriate and within the cognizance of this Court to observe how the Executive arm of the City Government interprets and construes this Ordinance.

> "The answer is signed by the Attorney General of the State; and if he were authorized to interpret the meaning of the other voice of the State heard in Art. No. 10, would seem to impart that the latter was a bill of pains and penalties disguised in general words."

Justice Holmes in *McFarland v. American Sugar Refining Co.*, 241 U. S. 79, 85.

In its brief in opposition to the petition for writ of certiorari, the respondent, through the City Attorney asserted that,

> "No doubt the Superior Court assumed and this Court may assume in this connection, that the Communist Party of the United States of America is and has always been, and that the Communist Political

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[8] False oaths and affidavits, such as the ones involved herein, constitute perjury in California. Penal Code, Sections 118, 118a; *People v. Ziady*, 8 Cal. 2d 149, 64 P. 2d 425.

> Association during its existence was at all times, an organization * * * created and administered for the prime purpose of overthrowing the constitutional government of the United States * * *" (p. 15).

Here is an admitted "finding" of past and present unlawfulness by sheer fiat.

That the intent is to inflict punishment for past offenses is made perfectly plain by the legislature, speaking through its authorized representative. The Ordinance was enacted

> "To insure that none of their employees had been engaged within that recent period in felonious conduct forbidden by the Smith Act (United States Code, Title 18, Section 2385) and by the California Syndicalism and Sabotage Law—and the provisions of Section 432 of the Charter * * *". (P. 2.)

> "The relevancy of the declarations required to be made in the oath * * * is supported by the California Syndicalism and Sabotage Law * * * and by the California Subversive Organizations Registration Law—and by the provisions of Sections 2381-2386 of Title 18 of the United States Code" (p. 10).

Failure to take the Oath was construed as meaning:

> "I could not truthfully execute the affidavit required of me, because I am or have recently been a member of—and each of these organizations is a criminal conspiracy. Evidence of my membership consequently would lead to my prosecution under the Smith Act * * * the California Syndicalism and Sabotage Law. I could not truthfully take the oath, and * * * if I nevertheless had taken the oath I would have subjected myself to prosecution for perjury" (p. 21).

In the light of such construction, it can hardly be contended that the oath and affidavit were not intended to identify the class of persons upon whom the punishment of perpetual exclusion was to be visited.

Of the determination of guilt by the legislature and the intention to dismiss upon failure to take the oath, one need only note the following statement:

> "* * * it is still more absurd to contend, as the petitioners do in effect, that one has an enforcible right to occupy a position of public trust and at the same time a protected right or privilege to scheme, conspire and work for the forcible overthrow of the government" (p. 12).

And it is not unimportant to note in this connection that the petitioners here are in fact discharged, and this admittedly only because their "failure to comply with the provisions of Ordinance Number 94,004" [R. 6]. That the Ordinance means what it says is evidenced from the action taken by the respective appointing powers immediately after the effective date [R. 13]. The notices of discharge [R. 23] stated:

> "You are hereby notified that the Board of Public Works has discharged * * * for the following cause * * * Cause I. He failed to take and subscribe to the oath set forth in Section 1 of Ordinance No. 94,004 passed by the Council of the City of Los Angeles on October 21, 1948 as required by the provisions of the said ordinance. Cause II. He failed to execute an affidavit stating whether or not he was or ever had been a member of the Communist Party of the United States of America or of the Communist Political Association as required by—provisions of the said ordinance." [R. 23.]

By a single letter addressed to counsel [R. 25-26] for all 17 petitioners, the Civil Service Commission sustained the charges as made [R. 25].[9]

The Ordinance enacted by the Council of the City of Los Angeles inflicts punishment without judicial trial and by an entire substitution of inquisitorial procedures for the common-law accusatorial system. It is a bill of attainder and *ex post facto* law within the express prohibitions of the United States Constitution.

D. Conclusion—The Decisions of This Court in Dent, Hawker and Lovett

Dent v. West Virginia, 129 U. S. 114, emphasizes, and is not contrary to, the views heretofore expressed. The decision was rendered by Justice Field who noted that the West Virginia statute in operation and effect was entirely different from the statute involved in the *Cummings* and *Garland* case. Justice Field stated that neral qualifications appropriate to a calling and attainable by reasonable study or application are not objectionable because of their

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[9]That the Oath and Affidavit were considered inseparable is evidenced by the fact that all 17 were discharged at one time, although two had signed the oath but not the affidavit.

On the issue of separability or narrowing construction, there does not appear to be any manner in which the invalidity of the oath and affidavit can be cured. The requirements of the Ordinance do not operate only *in futuro*. In issue here are *past completed discharges*, effective January 7, 1949, and predicated upon a refusal to sign the Oath and Affidavit as it then existed and exists now—unqualified by any separation or construction. Both from the viewpoint of plain legislative intent and from the fact that it cannot be determined now whether petitioners would have signed an Oath and Affidavit different in form and content, it would appear, it is respectfully submitted, that this Court is in no position to rewrite the Ordinance. See *Stromberg v. California*, 283 U. S. 359, 368; *Williams v. North Carolina*, 317 U. S. 287, 292; *In re Bell*, 19 Cal. 2d 488, 500; *Yu Cong Eng v. Trinidad*, 271 U. S. 500.

stringency or difficulty. But if they have no relation to a calling, or are unattainable by such reasonable study and application, they operate to deprive one of his right to pursue a lawful vocation (p. 122).

The West Virginia statute presented nothing which indicated an intention of the legislature to deprive anyone of his rights (p. 123).

> "There is nothing of an arbitrary character in the provisions of the statute in question; it applies to all physicians, except those who may be called for a special case from another State; it imposes no conditions which cannot be readily met; and it is made enforceable in the mode usual in kindred matters, that is by regular proceedings adopted to the case" (p. 124).

There was no denial of a hearing judicial in character. No expurgatory oath was involved.

The *Cummings* and *Garland* cases were different, stated Justice Field.

> "A large portion of the people of Missouri were unable to take the oath, and as to them the court held that the requirements of its constitution amounted to a legislative deprivation of their rights" (p. 126).

> "The court held that the law in exacting the oath as to his past conduct as a condition of his continuing in the practice of his profession, imposed a penalty for a past act, and in that respect was subject to the same objection as that made to the clauses of the constitution of Missouri and was therefore invalid."

In sum, there were only general qualifications set forth in the statute which satisfied the due process requirements

so far as arbitrariness was concerned; there was no intent to punish or deprive anyone of his office, and the statute was enforcible "by regular proceedings adopted to the case."

Hawker v. New York, 170 U. S. 189, dealt with a statute which provided generally that any person after conviction of a felony who attempted to practice medicine would be guilty of a misdemeanor. The statute was held constitutional as applied to a person who had been convicted of a felony prior to its enactment.

The majority of this Court held, as in *Dent*, that a State had the undoubted right to prescribe general qualifications for physicians; that one of those qualifications could be good moral character; and if not arbitrarily done, the State could determine what shall be the evidence of that character (p. 195). Violation of the criminal law could be made a test of bad character; "and if it may make a violation of criminal law a test of bad character, what more conclusive evidence of the fact of such violation can there be than a conviction duly had in one of the courts of the State? The conviction is, as between the State and the defendant, an adjudication of the fact" (p. 196).

While the dissenting justices maintained that the statute did inflict additional punishment and determine bad character arbitrarily, there is not the slightest intimation from any of the Justices that a legislature could declare individuals, or easily identifiable classes of persons, morally unfit to practice medicine because of past violations without any judicial determination of that fact. The *Hawker* case presupposes some judicial hearing with "the question of violation to be determined according to the ordinary

rules of evidence." The Ordinance here deliberately excludes without any opportunity to hear or be heard according to the processes of law. The two situations are entirely and essentially different.

The Ordinance here does more violence to the constitutional prohibitions than the Congressional statute in *United States v. Lovett*, 328 U. S. 303. The latter statute identified three individuals by name. The Ordinance here just as effectively identifies the persons upon the Ordinance is intended to operate.

There may have been room in the *Lovett* case to argue that the statute on its face did not inflict the penalty of perpetual exclusion from office, though it cannot be denied that the intent was plain enough. That problem is not presented here. This Ordinance determines guilt and compels dismissal with all the trappings of judicial magistracy. The statement of this Court in the *Lovett* case is equally applicable here (p. 317):

> "Those who wrote our Constitution well knew the danger inherent in special legislative acts which take away the life, liberty, or property of particular named persons because the legislature thinks them guilty of conduct which deserves punishment. They intended to safeguard the people of this country from punishment without trial by duly constituted courts. * * * And even the courts to which this important function was entrusted were commanded to stay their hands until and unless certain tested safeguards were observed. * * * When our Constitution and Bill of Rights were written, our ancestors had ample reason to know that legislative trials and punishments were too dangerous to liberty to exist in the nation of free men they envisioned. And so they proscribed bills of attainder."

II.

The City of Los Angeles Was Without Constitutional Power to Require the Test Oath and Affidavit Set Forth in the Ordinance and Petitioners' Discharge for Failure to Execute the Said Oath and Affidavit Deprived Petitioners of Freedom of Speech, Press, Assembly, Association and the Right to Petition for Redress of Grievances Without Due Process of Law in Violation of the Fourteenth Amendment to the United States Constitution.

A. Introduction.

This Ordinance was enacted "to insure the loyalty of the officers and employees" of the City of Los Angeles [R. 11].

In broad aspect, there would appear to be only two methods by which a municipality can "insure" the loyalty of its employees, assuming that the word loyalty has any fixed content. The first is the voluntary method by which the municipality, through different and appropriate means, elicits the loyalty of its employees. The other method is the compulsory method. Here the means used may also vary, but the object and purpose is to compel loyalty, regardless of the will of the employee.

Generally, there are two methods of *compelling* the loyalty of government employees. The Government may require that all of its employees swear, as a condition of continued employment, that they are and will be loyal to the Government. The oath is promissory in character. Scruples with respect to taking the oath, if foregone, will enable the employee to continue in his employment. This may be described as the "alteration of loyalty" method. This compulsory method is familiar in history. The

Romans employed it with respect to all their civil functionaries.

> "When anyone was accused of Christianity, he was required as a means of testing the truth of the charge, to offer incense to the gods or to the statutes of deified Emperors. His compliance at once exonerated him. The objection of the Christians—they and the Jews were the only objectors—to the worship of the Emperors was, in the eyes of the Romans, one of the most sinister signs that their religion was dangerous. The purpose of this worship was to symbolize the unity and solidarity of an Empire which embraced so many people of different beliefs and different gods; its intention was political, to promote union and loyalty; and it is not surprising that those who denounced it should be suspected of a disloyal spirit."
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> Bury, J. B., a History of Freedom of Thought (1913), p. 43.

The second method which a Government may use to compel loyalty can be described as the "excision" method. Nothing is left to the will of the employee. The perfect symmetry of loyalty in the body politic is achieved by simply scraping off all protuberances deemed by the Government to be disloyal. Examples of such methods are familiar in contemporary history. One of the latest examples is the Ordinance here.

The position of the petitioners is: (1) a municipality is without authority under the United States Constitution to *compel* the *loyalty* of its employees or citizens; (2)

where the end result sought by a municipality is the loyalty of its employees, the means used to attain such result must be legitimate, that is, they must not punish, restrain, or abridge First Amendment liberties as embodied in the Fourteenth Amendment; (3) the security of the State is not "insured" by a compulsory test oath and since other appropriate means (legal and otherwise) are available to obtain "loyalty," the rights of employees of a municipality to exercise the freedoms guaranteed them by the Constitution are not overborne by the interest of the municipality to employ only loyal employees.

It is important, it is respectfully submitted, to delimit the issues involved herein. We are not dealing here with any compulsory oath required under any and all circumstances. We do not discuss oaths required of jurors, or of witnesses in a trial. We are not discussing the oaths affixed to an income tax return, nor the oaths of witnesses appearing before a legislative committee, nor the constitutional oath of office. The principles we discuss hereafter may, of course, have applicability beyond the confines of this case where they may be tested to the limits of their logic, but it is this Ordinance and the compulsory test oath therein contained which we here examine.

We do not conceive our arguments herein to be in terms of absolutes. It is true that petitioners deny the power of the City to compel a loyalty oath. This argument, however, proceeds from the basic assumption that the State does not have an unbridled and arbitrary power over the lives, liberties or properties of its citizens and em-

ployees.[10] On the same terms, the petitioners recognize that speech which injures other individuals, as in libel or slander, or speech which is not in the area of advocacy but merged with unlawful conduct may come within the compass of the law. (See, *Thornhill v. Alabama*, 310 U. S. 88; *Chaplinsky v. New Hampshire*, 315 U. S. 568; *Reynolds v. United States*, 98 U. S. 145.) But speech which constitutes the advocacy, teaching or advising of

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[10]That a State does not have unlimited "police powers" with respect to its citizens, or any class of its citizens, is settled. *Shelley v. Kramer*, 334 U. S. 1; *Ex parte Virginia*, 100 U. S. 339; *Moore v. Dempsey*, 261 U. S. 86; *Powell v. Alabama*, 287 U. S. 45; *Mooney v. Holohan*, 294 U. S. 103; *Chambers v. Florida*, 309 U. S. 227; *Cantwell v. Connecticut*, 310 U. S. 296; *American Federation of Labor v. Swing*, 312 U. S. 321; *Pennekamp v. Florida*, 328 U. S. 331; *Yick Wo v. Hopkins*, 118 U. S. 356; *Steele v. Louisville & Nashville R. R. Co.*, 323 U. S. 102; *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337.

That the right to pursue an avocation or public calling is a fundamental right of all citizens and that the exercise of this right cannot be clogged with conditions that are repugnant to their constitutional liberties, is also settled. *Cummings v. Missouri*, 4 Wall. (U. S.) 277; *Ex parte Garland*, 4 Wall. (U. S.) 333; *Meyer v. Nebraska*, 262 U. S. 390; *Pierce v. Society of Sisters*, 268 U. S. 510; *United Public Workers v. Mitchell*, 330 U. S. 75. A citizen who serves the state in public office or employment does not impliedly surrender his constitutional rights. *Board of Education v. Haddon Farms*, 128 N. J. L. 306, 25 A. 2d 905; *Spayd v. Ringling Rock Lodge*, 270 Pa. 67, 113 Atl. 70. Under a general statute prescribing standards of competence and suitability, a citizen may not claim any legal right to be selected in any particular instance for any particular job. If while occupying an office he is shown to have accepted a bribe and remained silent when the evidence was presented, he may not claim that his right of privacy has been invaded. In such a case, proof of bribery, undenied, is the cause of the dismissal. *Cf., McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 29 N. E. 517. But see the opinion of Justice Holmes in *United States ex rel. Milwaukee v. Burleson*, 255 U. S. 407, 437. It does not follow, however, that a citizen may be arbitrarily denied employment or disqualified from office by special legislation without hearing or proof of unlawful conduct. *Cummings v. Missouri*, 4 Wall. (U. S.) 277.

ideas, of opinions or of beliefs are wholly free from governmental intrusion. "Where the First Amendment applies, it is a denial of *all* governmental power in our federal system." (*Marsh v. Alabama,* 326 U. S. 501, 511.) See also, opinion of Justice Rutledge in *Musser v. Utah,* 333 U. S. 95, 98.

Nor, as the petitioners view it, are the issues here affected by decisions which deal with claims that a statute general in operation has prescribed standards unlawful or unconstitutional, or that a valid statute has been unlawfully or unconstitutionally construed and applied. In the process of a hearing or appropriate administrative inquiry, procedural or substantive due process may be denied, largely determined by the facts and circumstances of the particular case. That is not the situation here. This Ordinance prescribes no general standards of education, experience, knowledge and ability as qualifications for office. As a matter of fact those standards have already been prescribed. See Charter, City of Los Angeles, Section 100, *Cf.* Charter, Sections 103, 112. The petitioners here have never been charged with misconduct in office, nor has evidence of any misconduct ever been presented at any hearing or trial. No such claim of misconduct has ever been made by the municipality [R. 6]. This legislation is special and specific, intended solely to compel loyalty by means of a test oath and affidavit and to perpetually exclude those who cannot or will not sign.

The petitioners' claims arise out of the failure to take the particular oath set forth in this Ordinance. The form and content of this oath, the intent, operation and effect of this statute, is what is involved here.

B. The Decisions of This Court in the Gobitis and Barnette Cases.

In *Minnersville School District v. Gobitis*, 310 U. S. 586, this Court had before it the validity of a regulation of a schoolboard requiring all teachers and students to salute the national flag and make the following pledge:

> "I pledge allegiance to my flag, and to the Republic for which it stands; one nation indivisible, with liberty and justice for all."

Objection to the pledge was based on the grounds of religious scruples which forbid such gestures of respect for the flag.

In sustaining the school regulation as a valid exercise of the police power, Justice Frankfurter writing for a majority of this Court, held that the religious liberty which the Constitution protects has never excluded legislation of general scope "not directed against doctrinal loyalties of particular sects" (p. 594). Assuming that power existed to compel the affirmation required in the pledge, Justice Frankfurter wrote that national unity was the basis of national security, and that the compulsory flag salute was an appropriate means which a state could employ to attain such a permissible end.

The dissenting opinion of Chief Justice Stone, emphasized that an initial question of power was involved in the case. The law did "more than suppress freedom of speech and more than prohibit the free exercise of religion". (p. 601). "If these guaranties are to have any meaning they must, I think, be deemed to withhold from the state *any* authority to *compel* belief or the expression of it where that expression violates religious convictions, *whatever may be the legislative view of the desirability of*

such compulsion" (p. 605) (emphasis supplied). But even if it be argued that there is room for legislative judgment, stated Justice Stone, still that judgment is open to judicial examination and where other means are available to elicit respect for the flag without infringing upon liberties guaranteed by the Constitution, the regulation cannot stand.

Some three years later, the same issue was before this Court, in *West Virginia State Board of Education v. Barnette,* 319 U. S. 624. The statute compelling the pledge and flag salute was held unconstitutional. Proceeding to the heart of the matter, Justice Jackson stated:

> "The question which underlies the flag salute controversy is whether such a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority under powers committed to any political organization under our Constitution. We examine rather than assume existence of this power." (P. 636.)

What was the content of the idea which was sought to be compelled?

> "Here it is the State that employs a flag as a symbol of *adherence to government as presently organized.* It requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks. Objections to this form of communication *when coerced* is an old one well known to the framers of the Bill of Rights" (P. 633.) (Emphasis supplied.)

Was there power under our constitutional system "to force an American citizen publicly to profess any statement of belief or to engage in any ceremony of assent to one?" (P. 634.) Was there power, in short, to *coerce*

adherence to government as presently organized? The answer was as follows:

(1) Because a government is without constitutional power to *compel* loyalty does not weaken or destroy the security of the government. "It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end." (P. 637.)

(2) However much deference may be due to the delicate balance of federal-state relationship in our American system, no power can be exerted by any political subdivision of government which contravenes the letter or spirit of the Constitution. "* * * none who acts under color of law is beyond reach of the Constitution." (P. 638.)

(3) This Court acts not by authority of its competence but by force of its commissions. While it is committed to the legislatures as well as the courts to guard cherished liberties, certain subjects by the Constitution are withdrawn from the vicissitudes of political controversy, are placed beyond the reach of majorities and officials, and are established as *legal principles* to be applied by the courts.

(4) Finally, and most important, if national unity is a legitimate end, is the compulsion to swear an oath of adherence to government as presently organized an "appropriate means" for its attainment? It is not, and it is not because the Constitution says it is not. "Compulsory unification of opinion achieves only the unanimity of the graveyard. * * * the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings.

* * * We set up government by consent of the governed and the Bill of Rights denies those in power any legal opportunity to coerce that consent. * * * But freedom to differ is not limited to things that do not matter much. * * * The test of its substance is the right to differ as to things that *touch the heart of the existing order.* * * * no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, *or force citizens to confess by word or act their faith therein*" (pp. 641, 642). (Emphasis supplied.)

The conclusion of the majority of this Court was that "the action of the local authorities in compelling the flag salute and pledge *transcends constitutional limitations* on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from *all* official control" (p. 642). (Emphasis supplied.)

In adhering to his former views expressed in the *Gobitis* case, Justice Frankfurter made one affirmation which has bearing on the issues here (p. 663):

"The flag salute exercise has no kinship whatever to the oath tests so odious in history. For the oath test was one of the instruments for suppressing heretical beliefs. . . . Had we before us any act of the state putting the slightest curbs upon such free expression, I should not lag behind any member of this Court in striking down such an invasion of the right to freedom of thought and freedom of speech protected by the Constitution."

In maintaining that a state had the power to compel the affirmation of a belief or opinion, and that the exercise of such power did not constitute an infringement of liberties guaranteed by the Fourteenth Amendment, we believe, it is respectfully submitted, that the learned Justice was in error. The absolute prohibition of the First Amendment is based upon the experience of history that there are more ways than one of "suppressing heretical beliefs." Death is not the only way, nor even the surest. There are other ways.[11] Even the threat of denial of a public education to young children may suppress belief, or curb it. The Constitution was designed "to avoid" suppression by avoiding its beginnings. It is important to note, however, that there was no disagreement between the members of this Court on the invalidity of test oaths. Test oaths are intended to suppress beliefs, and such instrumentalities are incompatible with the Constitution.

It is submitted that the foregoing discussion applies with equal validity here. What is the avowed purpose of the Oath contained in this Ordinance? It is to "insure the loyalty" of officers and employees of the municipality.[12] How is this loyalty to be "insured?" It is to be assured by *compelling* each employee, upon pain of exclusion from his chosen avocation, to swear that he has never in the past, does not now, and never will personally or in assembly with others, ever express the opinion, or advise, or teach the overthrow by force or violence or "other unlawful

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[11] ". . . man might as well be imprisoned, as excluded from the means of earning their bread." Mill, J. S., On Liberty (1885), p. 60.

[12] 6,000,000 citizens, excluding military personnel, are today in public employ. Mosher, Kingsley and Stahl, Public Personnel Administration (1950), p. 43.

means," of the Government of the United States or of the State of California. If one reads the preamble and the requirements of the Oath contained in the Ordinance together it is clear that its avowed intention is to compel perpetual loyalty to government by extracting a sworn oath that the individual will never express the concept of revolutionary overthrow of the government.[13] No matter how tyrannical the Government may become, even if it should trample upon the Constitution and deny all lawful

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[13]In the context of this case we do not discuss the political, social or philosophical merits or demerits of this idea, or the various meanings which different groups in society may give to it. It is sufficient that it is an idea, an opinion or concept. As such, it has its place in the marketplace of ideas and is entitled to respect whether we agree with it or not. "The worst offence of this kind which can be committed by a polemic, is to stigmatize those who hold the contrary opinion as bad and immoral men." Mill, J. S., On Liberty (1885), p. 97. As to the social utility of such discussion which touches "the heart of the existing order," see the same author, pp. 95-96. That the idea is deeply imbedded in American tradition is attested by the catalogue of statements set forth in the footnote (12) in the opinion of Justice Jackson in *American Communication Association v. Douds*, 339 U. S. 382, 440. That the idea embodies more than tradition and is fixed in our constitutional tenets is reflected in Judge Rutledge's reference to "the inalienable right of revolution which our fathers exercised in the Declaration of Independence." A Declaration of Legal Faith (1947). See also, Commager, H. S., Documents of American History (1940), 2nd Ed.; Parrington, V. L., Main Currents in American Thought (1927), Vol. 1.

If the advocacy of an idea is suppressed, it is difficult to perceive how belief in the idea is not "suppressed" as well. Thought without expression is valueless. In time it will either wither away or linger on until later and freer generations permit it to be heard. As Justice Holmes stated: ". . . the use of the mails is almost as much a part of free speech as the right to use our tongues." *U. S. ex rel. Milwaukee J. D. Pub. Co. v. Burleson*, 255 U. S. 407, 437.

Even in the realm of conduct, we do not conceive it within the power of a state to "insure" loyalty by extracting a forced oath, upon pain or dismissal, confessing the commission of criminal offenses. See, *Chambers v. Florida*, 309 U. S. 227; *Watts v. Indiana*, 338 U. S. 49; *In re Oliver*, 333 U. S. 257.

opportunity to amend it, and refuse citizens the exercise of the franchise, even then, the citizen in public employ is required to hold his tongue and be "loyal" to the Government. As in the *Barnette* case, he has sworn "adherence to government as presently organized."

It must be emphasized, however, that the Oath here is far more stringent than the one involved in the flag salute cases. In the latter, the pledge which was required included only an affirmation of allegiance to the flag and the Republic for which it stands. If religious or moral scruples could be overcome, the pledge could be taken and the advantages of a public school education retained. While compulsion by the state upon individuals to forego beliefs, or to express beliefs not believed, was held unlawful by this Court, it should be noted that the difference between majority and minority in the *Barnette* case lay principally in the view, on the one hand, that authority was without *any* power to *compel* expression of beliefs as a means of obtaining loyalty, and on the other hand, in the view that authority *might* condition the use of its schools upon compulsory affirmation of loyalty, provided that the individuals were left free, in and out of the schools, to disavow the beliefs they had been forced to express. There was not, in Justice Frankfurter's view, "the slightest curbs upon such free expression."

> *West Virginia State Board of Education v. Barnette, supra,* p. 664.

Under this Ordinance, however, there is more than a "slight curb" on free expression. Here, an individual can lose his livelihood, and suffer stigma and disgrace, if he cannot swear that in the last thirty years (since force and violence and Communist Party are equated) he has not for even a day expressed the view that the government

should be forcibly overthrown. And since the situations are rare when this concept is ever punished in the abstract, but is often interpreted by officialdom as including any advocacy of fundamental societal changes [see Section 9 of the Ordinance, R. 13], the individual is effectively stripped of his office and livelihood, even if he were to swear that his mind would forever be like a sheet of blank paper.

Nor should it be overlooked that the first portion of the Oath [R. 11] requires the individual to support and defend the Constitution, while in the second portion of the Oath he is required to disavow a belief which the Constitution protects. He is required to support a Government perpetually, no matter how autocratic it may become, despite the fact that the Constitution which he has sworn to uphold guarantees to each state a Republican form of government.

The petitioners submit the municipality here was without constitutional power to exact such test oath. They assert further that even if the power to compel loyalty existed, the instrumentality of a test oath is not a legitimate means to obtain such result. Both of these propositions are amply supported by historical and legal precedents, to which the discussion hereafter is devoted.

C. Compulsory Loyalty Oaths Have No Place in the American Constitutional System.

"A long time was needed to arrive at the conclusion that the coercion of opinion is a mistake, and only a part of the world is yet convinced. That conclusion, so far as I can judge, is the most important ever reached by men."

Bury, J. B., A History of Freedom of Thought (1913).

A history of the struggles for the freedom of reason against the coercion of Authority can only be briefly sketched. It is safe to say that from the sixteenth century to the American and French Revolutions nearly all important historical events bore in some way on the struggle against coercion. Such a history would include, for example, the struggle against the censorship of the press (Milton, Areopegetica, Works, IV); the rise and fall of Star Chamber; the seditious libel prosecutions against Wilkes and Junius; the defense of Stockdale by Thomas Erskine; the persecutions in eighteenth century England of the London Corresponding Society, Orange Societies and Anti-Corn Law Societies; the sedition trial of Thomas Muir for advocating parliamentary reforms, the religious persecutions which plagued England and Europe for centuries; the martyrdom of Sir Thomas More who would not execute an oath of loyalty to the King by renouncing the head of the Catholic Church; the test oaths[14] and prosecutions on oaths *ex officio*—in sum, the wide sweep of important historical events which affected the hearts and minds of those who migrated to the New World.

One reference from the pages of history may be cited. In defending Paine, under an indictment for publication of the Rights of Man, Erskine stated:

> "If, in the march of the human mind, no man could have gone before the establishments of the time he lived in, how could our establishment, by reiterated changes, have become what it is? If no man could

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[14] Some of the history and content of these test oaths are contained in the footnotes (3, 4, 7, 8) of the dissenting opinion of Justice Black in *American Communications Association v. Douds*, 339 U. S. 382, 447, 451. See also, Encyclopedia Britannica, "Inquisition"; "Test Acts"; and the statutes recited in Point I of the Argument herein.

have awakened the public mind to errors and abuses in our Government, how could it have passed on from stage to stage, through reformation and revolution, so as to have arrived from barbarism to such a pitch of happiness and perfection, that the Attorney-general considers it as profanation to touch it further, or to look for any further amendment?

In this manner power has reasoned in every age; government in *its own estimation*, has been at all times a system of perfection; but a free press has examined and detected its errors, and the people have from time to time reformed them. This freedom has alone made our Government what it is; this freedom alone can preserve it; and therefore, under the banners of that fredom, today I stand up to defend Thomas Paine."

Paine, Life and Writings (N. Y. 1908), Vol. I, Wheeler ed. p. 100.

The struggle in America for what James Madison described as "free and responsible government" found its pivotal point in the effort to emancipate the opinions of men from governmental coercion. Roger Williams and Ann Hutchinson are but symbols of that struggle. (Ernst, Roger Williams, New England Firebrand (N. Y. 1932); Adams, Emancipation of Massachusetts (N. Y. 1919).) For even in the colonial days, marked as they were with religious and secular dogmatism, the view that "neither the political state nor the official hierarchy can justly coerce the individual conscience" permeated in constantly increasing strength the minds of the common people. (Parrington, V. L., Main Currents in American Thought (N. Y. 1927), Vol. 1, p. 12.) In New England, the struggle centered around "the right of the individual to determine his own belief, uncoerced by external authority" (*id.* p. 52). Samuel Adams well knew, states Parrington, that

"America was founded in rebellion, . . . and it should continue in rebellion till every false loyalty was cast off and concern for the common well-being accepted as the single loyalty worthy of respect" (p. 234). As the Revolution neared, Paine was advising that "There can be no trusteeship superior to the sovereign people—no constitution beyond their rightful power to alter or destroy" (*id.* p. 325). Madison wrote, ". . . the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men." Memorial and Remonstrance Against Religious Assessments, 11 Writings of Madison, p. 183. Jefferson held that "the opinions of men are not the object of civil government nor under its jurisdiction." Works, Mem. Ed. Vol. 2, p. 300. In the Virginia Statute of Religious Liberty, it was stated:

> "Whereas Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations . . . are a departure from the plan of the Holy author . . ., who being Lord both of body and mind, yet chose not to propagate it by coercions on either. . . ."[15]
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> Commager, H. S., Documents of American History (1940), p. 125.

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[15]The history of freedom of thought is written largely in the pages of volumes on religious freedom, for until modern times, separation of church and State was not familiar. That history demonstrates that freedom of opinion and freedom of religion are cognate rights. *De Jonge v. Oregon*, 299 U. S. 353. For other background of the struggle against the coercion of opinion by the State, see Kentucky Resolutions of 1798 and 1799, 4 Elliot's Debates 540; the history of the "Committees of Correspondence" in History of the State of New York (N. Y. 1933), Fleck Ed., Vol. III; the defense of the "democratic societies" Life of Madison (Bost. 1859), Vol. 3, pp. 464-469; Am. Cong. 3rd Cong: 1st and 2nd Sess. 1793-1795, pp. 934-935; the story of the abolitionists, Birney, William, James J. Birney and His Times (N. Y. 1890); Goodell, Slavery and Anti-Slavery (N. Y. 1852). See also, *Illinois ex rel. McCollum v. Board of Education*, 333 U. S. 203, 227, 228.

It was from this background that the American conception of political freedom was born. It was understood that the people are the ultimate source of all political power; that the form of government is republican; and that the powers of government are defined and limited in fundamental constitutional laws. As Madison stated: "The authority of constitutions over governments, and of the sovereignty of the people over constitutions, are truths which are at all times necessary to be kept in mind; and at no time like the present." Report on the Virginia Resolutions, 4 Elliot's Debates, p. 550. He stated further: "If we advert to the nature of Republican Government in general, we shall find that the censorial power is in the people over the government and not in the government over the people." Ann. Cong., 3rd Cong. 1st and 2d Sess., p. 934. The fundamental nature of this principle has been affirmed by this Court. See opinion of Justice Jackson in *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 641.

In order to devise a form of government in which political power would cease to be arbitrary, the founding fathers placed above and beyond the reach of governmental action, those "sacred and imprescriptible rights which are enumerated in the Bill of Rights. They include, among others, freedom of religion, freedom of speech and the press, freedom of assembly and the right to petition the government. In setting forth these civil liberties of the citizen, the constitutions define a sphere of action which is entirely withdrawn from governmental control." Becker,

Carl, Political Freedom in Safeguarding Civil Liberty Today (N. Y., 1945), p. 16.

That the framers of the Constitution believed that freedom of speech was a natural and inalienable birthright of every individual cannot be doubted. But it is also clear, that they recognized greater social and political values in the unrestricted expression of opinion than those which were simply humanitarian. Imbued with the philosophy of Milton, Locke and Montesquieu, they recognized that not only the individual, but all of society, had a stake in freedom of the mind. They recognized that to advance knowledge and to correct errors, unrestricted freedom of opinion was required. The history of civilization, from Greece through the dark ages, indicated that a fundamental condition of social progress was perfect liberty of thought and expression.

> Bury, J. B., a History of Freedom of Thought (1913).

Moreover, the political value of an uncoerced citizenry was considered basic if the form of government created in 1789 was to survive. There could be no thought of "government by the consent of the governed" if that cosnent was not freely arrived at through the deliberative processes in society completely free from governmental intrusion. The security of the Republic (to which the members of the Council of the City of Los Angeles have pledged allegiance) rested upon that fundamental postulate. This thesis has been repeated many times by this Court:

> "The maintenance of the opportunity for free political discussion to the end that government may

be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."

Stromberg v. California, 283 U. S. 359, 369.

The cases are collected in the footnote (4) of the opinion in *United States v. Carolene Products Co.*, 304 U. S. 144, 151. It is in this sense that Justice Cardozo viewed freedom of thought and opinion as "the matrix, the indispensable condition, of nearly every other form of freedom." *Palko v. Connecticut*, 302 U. S. 319, 327.

It would appear, therefore, it is respectfully submitted, in the light of the foregoing, that there is no place in our constitutional system for any attempt by Government to *compel* citizens, upon pain of dismissal from their chosen pursuits, to express their opinions or beliefs, peaceful or revolutionary. It subverts the foundations upon which Government rests to compel loyalty and adherence by suppressing the beliefs and opinions of citizens that Government should be changed, whether those beliefs and opinion be true or false, agreeable or disagreeable. Compulsory loyalty laws are the hallmark of a despotism which was overthrown by revolution in 1776. That revolution was not successfully completed until the Constitution adopted by the people erected a fixed barrier against the return of ancient evils.

D. In the Light of the Liberties Guaranteed by the Fourteenth Amendment, the Compulsory Loyalty Oath Is an Inappropriate Means to Attain the Loyalty of Citizens in the Public Employ.

Heretofore we have discussed the lack of power in the municipality under the Constitution to exact the oath and affidavit set forth in the Ordinance.[16] The following is intended to demonstrate that even if the inculcation of loyalty of citizens in government employ is a permissible end—that is, that they shall adhere perpetually to the government as presently organized without revolutionary change—the instrumentality of the compulsory test oath is not a lawful means for obtaining such a result in the light of the indispensable freedoms secured by the Fourteenth Amendment. (*Thomas v. Collins*, 323 U. S. 516, 530.) Whatever deference may be due to federal-state relationship or to legislative judgment, those considerations are overborne in this case, it is respectfully submitted, by the express limitations of the Constitution and the tradition which the Constitution embodies. (*West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 639.)

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[16]As this brief was written, a decision was rendered by the California District Court of Appeal, Third Appellate District (*Tolman, et al. v. Underhill, et al.*, April 6, 1951, Civ. No. 7946), where an affirmation required of all members of the faculty of the University of California as a condition of employment that they are not members of the Communist Party "or any other organization" which advocates forcible overthrow of the government was held invalid. The Court construed the provisions for oaths of office contained in the California Constitution as intending "at least, that no one could be subjected, as a condition to holding office, to any test of political or religious belief other than his pledge to support the Constitutions of this State and of the United States, and that the exacting of any other test of loyalty would be antithetical to our fundamental concept of freedom." Los Angeles City Charter, Section 13, contains an oath of office requirement similar to that found in Article XX of the State Constitution.

There are many citizens who share the view that compulsory loyalty oaths—with the precise verbiage contained herein—are unnecessary, harmful, useless, and unlawful. A recent proposal to enact a similar oath for members of the Bar led to the issuance of a statement in opposition by a group of distinguished lawyers[17] which read in part:

> "The requirement of this new oath, moreover, will not in our judgment reveal the disloyal in our midst, whoever they may be . . . The existing means of discovering and punishing illegal or professionally improper conduct by presenting specific charges and supporting evidence are ample, in our belief, to meet any danger to our government or disgrace to our profession . . . We, therefore, oppose this method of intended detection . . . as unfounded in its implication of widespread disloyalty and illegal acts on the part of lawyers generally, and as unproductive of the hoped-for result."

The Committee on Law Reform of the Association of the Bar of the City of New York, in a formal report, also opposed the proposal. They found that safeguards already in existence were adequate to deal with any lack of loyalty or integrity; that the independence of the Bar would be seriously infringed and that grave constitutional questions were involved in the exaction of such an oath. "A lawyer who has already sworn to support the Constitution might conscientiously refuse to subscribe to an oath which may violate that same Constitution."

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[17] They included, among others, Owen J. Roberts, John W. Davis, Grenville Clark, C. C. Burlingham, John Lord O'Brian and Bethuel M. Webster. The statement appeared in the public press on December 17, 1950.

Zechariah Chafee, writing in the Harvard Law School Record (1950), stated:

> "A main effect of loyalty oaths for teachers, in Massachusetts and the University of California, was to throw out of the profession a few persons of recognized loyalty after years of devoted service."

Quoting the statement of a dean of the California university, Professor Chafee continued:

> "No conceivable damage to the University at the hands of the hypothetical Communists among us could have equalled the damage resulting from the unrest, ill-will, and suspicion engendered by this series of events."

In the field of scientific research, similar views prevail. Gelhorn, Walter, *Security, Loyalty and Science* (N. Y., 1950). The same general view is reflected in Barth, Alan, *The Loyalty of Free Men* (N. Y., 1951). "The only genuine loyalty is the loyalty of free men" (*id.*, p. 4). See also, O'Brian, John Lord, *Loyalty Tests and Guilt by Association*, 61 Harvard L. Rev. 592-661 (1948); Lerner, Max, Freedom; *Image and Reality in Safeguarding Civil Liberty Today* (N. Y., 1945), pp. 35-57. The same views may be found in Public Papers, Alfred E. Smith, 1923, p. 292; Public Papers, Herbert H. Lehman, 1938, p. 120; Chafee, Z., *Freedom of Speech* (1941). The opinions of Chief Justice Hughes in *Stromberg v. California*, 283 U. S. 359, and *DeJonge v. Oregon*, 299 U. S. 353, which reflect a lifetime philosophy (see *Memorial of the Special Committee*, 5 N. Y. Legis. Doc. No. 30, 143d Sess, 4, 1920), also support these views.

The inherent contradictions contained in the instant oath and affidavit are patent. In the first place, if as is argued

by respondent, failure to sign the oath is conclusive on the issue of disloyalty, why would not the same result follow if one failed to sign an oath which only required support for the Constitution? If such oath were not signed, according to the position of respondent, the individual would be automatically dismissed. If it were signed, and the appointing officer was in "doubt" as to whether the individual "swore falsely" or "has violated" the oath [Sec. 9, R. 13], he could "investigate and determine" the facts. Presumably, advocacy of force and violence and membership in the Communist Party are deemed by the City inconsistent with support for the Constitution.[18] It would therefore, follow that the employee would be dismissed. In either case, following the respondent's reasoning, the added oath would appear to be surplusage.

Further, as has been pointed out, compulsory loyalty oaths such as the ones involved here cannot possibly "insure" the loyalty of its employees. It cannot weed out the truly disloyal for on that very premise they would be the first to sign. It will in most cases exclude only those whose consciences as men and citizens will not permit them to sign such an oath. Unless one is prepared to equate noncomformity with disloyalty to government, the only result will be to exclude some of the worthiest citizens from their chosen avocations. See, Commager, H. S.,

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[18]The provisions of the Ordinance are sufficiently broad to permit the most arbitrary and discriminatory application of its provisions. Section 9 of the Ordinance [R. 13] provides that whenever an appointing authority "is in doubt" as to whether an oath has been falsely sworn or violated, he must "investigate and determine the facts." An alternate procedure [Sections 10-23, R. 13-18] may be invoked by the officials, but not by the employees. The existence of such provisions results in a continuous and pervasive restraint on all freedom of discussion. *Thornhill v. Alabama*, 310 U. S. 88.

Who Is Loyal to America? in Harper's Magazine, September, 1947; Curti, Merle, *The Roots of American Loyalty* (N. Y., 1946).

Nor can the oath "insure" the loyalty of those who remain. Compulsion, in itself, as the long history of civilization reveals, is never a means of inculcating loyalty. Unless beliefs, opinions and ideas are freely arrived at and freely expressed, they convey nothing but the prejudices of an individual who is not prepared to defend them on any rational basis. A state which possesses servants whose independence and judgment are gone, is an autocracy, not a democracy. The only loyalty which has any meaning is the loyalty which is freely given.

The loyalty of citizens in the public employ can be obtained in other ways than by compulsion. It is an affront to all citizens to think otherwise. There are sufficient democratic means at hand to weed out the real traitor and the real fakir. There is no arm of government today which does not have the power, within the limits of the Constitution, by investigation, accusation and hearing under proper standards, to rid itself of the unfit and incompetent. For those citizens who serve their government, loyalty can be elicited by positive considerations of education, training, conditions of employment, personnel administration, safety, health, welfare and all the related factors which lead civil servants to identify themselves with the goals of their work and their government. This is the only way to "insure" loyalty. Compulsion gives no such assurance, if indeed, it does not lead to the opposite result.

> "The worth of a State, in the long run, is the worth of the individuals composing it; and a State which postpones the interests of *their mental* expansion and elevation, to a little more of administrative

skill, or that semblance of it which practice gives, in the details of business; a State which dwarfs its men, in order that they may be more docile instruments in its hands even for beneficial purposes, will find that with small men no great thing can really be accomplished; and that the perfection of machinery to which it has sacrificed everything, will in the end avail it nothing, for want of the vital power which, in order that the machine might work more smoothly, it has preferred to banish."

Mill, J. S., *On Liberty* (1885), p. 204.

Conclusion.

The judgment of the court below should be reversed.

Respectfully submitted,

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Of Counsel.

Service of the within and receipt of a copy thereof is hereby admitted this _____ day of April, A. D. 1951.

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4-13-51—80